

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

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**SURREPLY OF NATIONAL TELECOM
IN SUPPORT OF PETITION BY NATIONS BANK FOR LIMITED
RECONSIDERATION OF THE
FIFTH MEMORANDUM OPINION AND ORDER**

Dated: March 9, 1995

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National Telecom, Inc. ("NatTel"), hereby submits its Surreply in Support of NationsBank's Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order ("NB Petition"); and also reiterates and clarifies certain of the points made in its own Petition for Reconsideration ("NatTel Petition").

INTRODUCTION

NatTel is one of many designated entities ("DEs") currently preparing to bid in the entrepreneurs' block auctions for broadband PCS licenses. Since the filing of the NT Petition, NatTel has had further substantive discussions with several banks which have evidenced an interest in lending to DEs in order to finance the build-out of their PCS systems. These discussions have led NatTel to reach the inexorable conclusion that the modifications to the Commission's rules as suggested in the NB Petition are required in order to allow DEs to acquire bank financing with which to build out their PCS systems.

I. THE COMMISSION'S EXISTING TRANSFER RESTRICTIONS WILL PREVENT DEs FROM ACQUIRING BUILD-OUT FINANCING

Commission rules currently limit voluntary transfers of entrepreneurs' block licenses during the first five years of the license term to DEs. This restriction, NatTel has found, has the effect of locking DEs out of the bank financing market. Why? Because banks will lend money only if they are allowed to foreclose on their collateral. The existing Commission rules prevent a lender from foreclosing during the first five years of the license term.¹ This means, very simply, that DEs will not be able to obtain bank financing for build-out during the first five years -- which is precisely the time period in which build-out financing will be most needed.

¹ Although existing Commission rules allow DE licenses to be transferred to other DEs after three years from license grant, this does not allow banks adequately to secure their collateral.

A. The Commission Should Allow DE Licenses to be Transferred
to Non-DEs Under Certain Circumstances

NatTel believes that the Commission should adopt the suggestion found in the NB Petition, and allow the transfer of DE licenses to non-DEs at any time **in the event of default on a loan used for build-out financing**, when another DE transferee cannot be found within 180 days.²

This change will result in the following process. If after an “Event of Default” occurs and a DE cannot reach a satisfactory workout of the loan with its lender, the lender will be able to foreclose on its collateral (most likely the stock of the DE which holds the license). Upon foreclosure, the lender would have 180 days in which to find another DE to whom the license can be transferred. During this time, the lender must use its “commercially reasonable best efforts” to find another DE.³ If the lender is successful, then the lender petitions the Commission to approve the transfer and, if the transfer is approved, all is well. If the transfer is not approved, or the lender is unsuccessful in finding another DE within the first 180 days, the Commission would then grant a 180-day extension for the lender either to find another DE transferee or a non-DE transferee.

In the NatTel Petition, NatTel stated that it did not believe that DE licenses should be allowed to end up in the hands of non-DEs prior to the fifth year of the license term, allegedly due to the risk of “sham foreclosures.” In retrospect, however, this position is incorrect and NatTel hereby retracts it in its entirety.

There are many reasons why, after the initial 180-day grace period, a DE license ending up in the hands of a non-DE will not offend the Commission’s goals with respect to the DE program taken as a whole. First, one must remember that if a DE has been foreclosed upon, this will have occurred only after the DE licensee attempted and failed to find another DE transferee.

² NatTel earlier argued for a 90-day grace period, but this clearly is inadequate. Particularly when one realizes that it takes 90 days just to foreclose on a loan, let alone find another buyer.

³ Since all license transfers are subject to Commission approval, the Commission will be able to determine during the approval process, on a case-by-case basis, whether in fact the lender used its commercially reasonable best efforts to find another DE transferee. If the Commission finds, based on the totality of the circumstances, that the lender did not use its commercially reasonable best efforts to find a DE transferee, the Commission could disallow the proposed transfer, force the lender to go back into the market and find another DE, etc.

Why? Because foreclosure means the DE's equity will have been completely wiped out; whereas a pre-foreclosure transfer to another DE will likely save whatever equity the original DE licensee has left in the deal.

Second, a transfer of a DE license to a non-DE will invoke the Commission's unjust enrichment penalties; meaning that the non-DE transferee will have to repay all of the government financing as well as the DE bidding credit. This, more than anything else, is the Commission's guarantee that "sham foreclosures" will not occur. It also means that other similarly situated DEs will have a better chance of acquiring the DE license in foreclosure because, unlike non-DEs, they will not have to suffer any unjust enrichment penalties.

Third, "sham foreclosures" will not occur because the costs of foreclosure are not immaterial. In other words, if a lender forecloses on a DE, by definition the DE was unable to meet its debt obligations. The legal, financial and other transactional costs incurred by lenders in foreclosure proceedings are of such magnitude that the lender almost invariably ends up receiving less than the amount of the outstanding obligation. As such, no lender will institute foreclosure proceedings unless all other commercially reasonable alternatives have been exhausted.

Finally, if a lender has had to foreclose on a DE and was unable, using its commercially reasonable best efforts, to find another DE transferee; this means that the only possible transferees available are non-DEs. The Commission's goal in the DE program is to maximize the opportunity that DEs will have to acquire licenses. What happens to DEs in the competitive marketplace after that is not the Commission's concern, nor should it be. If a non-DE ultimately ends up with a DE license, after the original DE licensee has become a commercial failure and no other commercially feasible DE transferee can be found, the Commission should not be concerned.

Thus, for the foregoing reasons, the Commission should modify the transfer restrictions so that they do not apply when a DE defaults on a loan used to finance the build-out (as opposed to license acquisition) of its system.

II. IF THE COMMISSION SUBORDINATES THE GOVERNMENT DEBT, INTERCREDITOR AGREEMENTS ARE UNNECESSARY

In addition to modifying the transfer restrictions as described above, the Commission should also determine that the installment payments owed to the Government for license acquisition will be subordinate to any third-party debt acquired by DEs to finance system build-out.

The reason for this modification is a simple one. NatTel has found in its many discussions with banks that, in addition to being able to foreclose on their collateral, banks must know that their debt is senior to that owed to the Government. Particularly when the Government debt has a 10-year term and most banks will lend only for a 7-year term. Without subordination of the Government debt obligation, banks would have to wait until after the end of the 10th year when the Government debt has been repaid in order for their debt to be repaid. This is just not commercially feasible and banks will not lend to DEs under such a scenario.

By simply stating that the Government debt obligation will be subordinate to that of third-party lenders financing system build-out, the Commission will allow DEs to obtain build-out financing and, at the same time, the Commission will not have to consummate intercreditor agreements; thereby avoiding the administrative headache that such a system would entail.

CONCLUSION

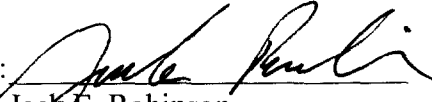
For the foregoing reasons, the Commission should modify and clarify its PCS auction rules as follows:

- 1) Transfer restrictions would not apply in the event a lender forecloses on a DE after having provided build-out, as opposed to auction, financing; and
- 2) The Commission clarifies that the debt owed to the Government will be subordinate to that provided by third-party lenders for build-out financing.

Dated: March 9, 1995

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jack E. Robinson, hereby certify that on this 9th day of March, 1995, a copy of the foregoing was served by either Federal Express (FE) or first class mail, postage prepaid (mail), on the following parties:

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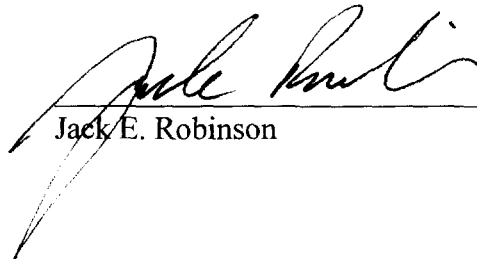
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